Filed 3/18/19 In re T.L. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re T.L., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. O.L., Defendant and Appellant.	F077940 (Super. Ct. No. JJV071095A) **OPINION**

APPEAL from an order of the Superior Court of Tulare County. Robin L. Wolfe, Judge.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Deanne H. Peterson, County Counsel, John A. Rozum, Chief Deputy County Counsel, and Carol Helding, Deputy County Counsel, for Plaintiff and Respondent.

-ooOoo-

The juvenile court ordered termination of the parental rights of appellant O.L. (father) as to his daughter, T.L., age 14, at a Welfare and Institutions Code section 366.26[1] hearing. Father appeals, contending the order terminating his parental rights must be reversed on two grounds: (1) the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) inquiry requirements were not complied with because mother, who never appeared in court but had contact with the Tulare County Health and Human Services Agency (agency), was never asked whether she had Native American heritage; and (2) the court erred by not clarifying T.L.'s ambiguous statements regarding her wishes to be adopted. While we find the court did not err by not inquiring further regarding T.L.'s wishes, we agree the court erred in failing to ask mother or mother's family members about her Native American heritage. Accordingly, we will remand the matter with directions.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On November 21, 2017, the agency filed a section 300 dependency petition on behalf of T.L., alleging T.L. came within the jurisdiction of the juvenile court under section 300, subdivisions (b)(1) and (g). The petition alleged father's substance abuse and mental illness symptoms rendered him unable to provide T.L. with regular care, placing her at substantial risk of suffering serious harm or illness. It alleged father used controlled substances, including but not limited to marijuana in the presence of T.L. and has a history of methamphetamine, marijuana, and alcohol abuse. In regard to father's mental health symptoms, the petition alleged father called a local news station and stated he had sociopathic thoughts. He also went to a McDonald's restaurant and said he

---

[1] Further statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] This section is limited to the facts and portions of the procedural history relevant to our review of the order terminating father's parental rights.

wanted to "do a Las Vegas shooting." Father was placed on a psychiatric hold due to this behavior. In support of the section 300, subdivision (g) allegation, the petition alleged T.L. was left without provision for support because the whereabouts of mother were unknown and reasonable efforts to locate her were unsuccessful. T.L. was detained.

At the time of T.L.'s detention, father and T.L. had been living in a one-room motel room for about two months. They had minimal food but enough to keep eating. T.L. reported to the social worker that father slept from 12:00 a.m. to 3:00 a.m. every night, smoked marijuana every day, and drank "bud light" one to two times per week. She reported he had a history of methamphetamine use but quit sometime in 2016. She reported father had recently told her he had seen an angel and cries from joy when he talks about it. She thought it was due to marijuana use so she took his marijuana away from him but gave it back the next morning. She reported she feels safe with father and is only afraid of him when he is using methamphetamine.

T.L. was placed with non-related extended family members Donna and David.[3] Donna and David raised T.L. until she was approximately three years old, at which point father petitioned for and was granted custody by family court. Donna and David remained in contact with T.L. and had court-ordered visits with her every other weekend. Donna informed the social worker she and David would like to adopt T.L.

On November 20, 2017, father signed a "PARENTAL NOTIFICATION OF INDIAN STATUS" form (ICWA-020), indicating he had no Indian ancestry as far as he knew.

On November 22, 2017, the court ordered continued detention. Father was not present at the detention hearing because he was hospitalized in a psychiatric hospital.

---

3 T.L.'s non-related extended family member caregivers are referred to by their first names for brevity and clarity and to protect their privacy. No disrespect is intended.

On December 8, 2017, mother contacted the social worker because she had heard T.L. had been detained. She informed the social worker she was not requesting custody and did not want reunification services. Mother stated she would like to attend the jurisdiction/disposition hearing to inform the court of her position. On December 14, 2017, the social worker had contact with mother again, and mother provided her address and phone number.

Father made his first appearance at the combined jurisdiction/disposition hearing on December 15, 2017, at which the court conducted an ICWA inquiry of the father on the record:

> "THE COURT: . . . Sir, do you know if [T.L.] has any Native American heritage?
>
> "THE FATHER: No, she don't.
>
> "THE COURT: Do you have any or know of anyone in your family who does?
>
> "THE FATHER: No, I don't."

Based on father's statements, the court made a finding that ICWA did not apply at that time. The matter was continued so that notice of the hearing could be provided to mother and because father desired to set the hearing as contested.

The contested jurisdiction/disposition hearing took place on February 2, 2018. The court found all allegations in the section 300 petition true and adjudged T.L. a dependent of the court. Family reunification services were not offered to father pursuant to the bypass provision in section 361.5, subdivision (b)(13).[4] The court set a section

---

[4] Section 361.5, subdivision (b)(13) provides family reunification services shall be bypassed under the following condition: "That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs

366.26 hearing, and father was ordered to have visits twice a week for two hours upon his release from the psychiatric hospital.

Father had his first and only scheduled visit with T.L. on March 21, 2018. Upon arrival to the visit and seeing T.L., father became overly emotional, and the visit was cancelled due to father not being ready to visit with T.L. Father did not express interest in visiting with T.L. again, and no other visits took place.

The section 366.26 hearing was held on July 6, 2018. The recommended permanent plan set forth in the section 366.26 report was adoption by Donna and David. The report indicated T.L. had an established relationship with her caregivers all her life, and they provided for her daily physical and emotional needs and desired to adopt T.L. The report indicated Donna and David were willing to utilize community resources to help in addressing T.L.'s needs if any additional needs were to arise in the future. Donna and David transported her to all needed appointments and set schedules for meals, chores, homework, and bedtime, which T.L. followed. They employed positive discipline methods and provided a nurturing, stable home.

After T.L.'s detainment, she had experienced depressed mood and anger, was referred for a mental health assessment, and began receiving individual counseling. The section 366.26 report indicated T.L. has demonstrated positive responses to treatment and

---

identified were available and accessible." The jurisdiction/disposition report stated: "On April 2, 2009, the father was arrested for possession of a controlled substance. He was ordered three years of Recovery Court. He violated probation on November 12, 2009. He was ordered to register as a narcotics offender. He was originally ordered Recovery Court in 2002 after being arrested for Under the Influence. He was arrested again in 2003 for drug charges, possession and under the influence. The father admitted to the social worker on December 14, 2017, that he uses marijuana. He also stated that when he was released from the mental health hospital on November 27, 2017, he took pills he obtained from a friend. The father told the social worker that he last used methamphetamine in September of 2016."

was approved to take psychotropic medication. Donna and David indicated they supported T.L. being in therapy and maintaining her mental health.

T.L. told the social worker she was very grateful to have Donna and David, whom she had always called " 'Mom and Dad,' " in her life. She stated she appreciated their willingness to adopt her and give her a better life. For that reason, she was in agreement with them becoming her adoptive parents in the future.

T.L.'s court appointed special advocate (CASA) filed a section 366.26 report indicating she agreed with the social worker's recommendation of adoption. The CASA reported she visited with T.L. at least once a week. She agreed the placement with Donna and David was appropriate but recommended they establish strong boundaries with T.L., as she had walked out of the home after getting upset and had been defiant with them. The CASA also noted in her report that T.L. generally shows respect to Donna and David. T.L reported to the CASA that she would like to go through with the planned adoption but would like the opportunity to live with her father if and when he was mentally able to do so.

Father testified at the section 366.26 hearing. He testified he had been T.L.'s primary caretaker since she was two years old. He stated they had a great relationship and were friends, and he taught her everything a little girl should know. He said they ate at restaurants together, watched movies, went to Lego Land, visited her sister, and that "[t]he greatest thing is just being there with her." He testified he was unable to visit meaningfully during the dependency proceedings due to medications he was on from his hospitalization.

Following father's testimony, the agency argued the parent-child relationship exception to adoption[5] did not apply. Father's counsel argued the termination of parental

---

[5] Section 366.26, subdivision (c)(1) reads in pertinent part: "[T]he court shall terminate parental rights unless . . . [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of

rights would be detrimental to T.L. because father had taken care of her for most of her life and should be able to continue to provide guidance to her. After father's counsel's argument, T.L.'s counsel requested an off-the-record discussion between the court and counsel. T.L.'s counsel then stated on the record:

> "This morning I talked with [T.L.] and we went over this, the recommendation of adoption, and she's in favor of that. That was her request this morning. After hearing her father testify she told me now she's not sure.
>
> "As her attorney and advocate in reviewing everything, starting from the detention to the 26 report, the—one of the issues is stability for [T.L.], and she has had a great relationship with Donna and David since she was two. They have always been there for her.
>
> "Yes, she loves her father and he loves her, there's no doubt about that, but she has also bonded and has become attached and loves Donna and David. She has stability there. She has been doing very good since her placement. She has been involved in activities. They recently went to the beach.
>
> "She's on medication and she told me the medication is helping her quite a bit, a little bit of issues with side effects, but she's doing well with the meds.
>
> "My recommendation is that the Court follow the recommendation of adoption and proceed with that. [¶] . . . [¶]
>
> ". . . One last thing. In talking with Donna, there is no doubt that they would continue to allow visitation between [T.L.] and her father."

The court noted the decision was difficult, but in considering the entire court file, it was persuaded by the stability Donna and David had provided to T.L. and how well she was doing in her placement. The court stated T.L. and her father loved each other, but in viewing the totality of the circumstances, father had not met his burden of proof that the

---

the following circumstances: [¶] [one of which is] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." This is commonly referred to as the "parent-child relationship exception."

parent-child relationship exception to adoption should apply. The court followed the agency's recommendation.

Mother never made an appearance in court, and notice of the section 366.26 hearing was served on her by publication.

DISCUSSION

I. Compliance with the ICWA

Father contends the order terminating his parental rights must be reversed because the juvenile court and the agency failed to inquire as required under the ICWA whether mother had Native American heritage. We agree with father that the matter should be remanded so the agency can conduct an inquiry as to whether T.L. has Native American ancestry on her maternal side.

Section 224.3 and California Rules of Court, rule 5.481(a),[6] impose upon both the juvenile court and the agency "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (See *In re W.B.* (2012) 55 Cal.4th 30, 53.) The social worker must ask the child, if the child is old enough, and the parents, if the child has Indian heritage. (Rule 5.481(a)(1).) Upon a parent's first appearance in a dependency proceeding, the juvenile court must order the parent to complete a form ICWA-020. (Rule 5.481(a)(2).) If the parent, Indian custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of a proceeding, the court must order the person or entity that has the inquiry duty under this rule to use reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered the parent, Indian custodian, or guardian to complete form ICWA-020. (Rule 5.481(a)(3).)

Agency concedes it is apparent from the record that neither mother nor maternal relatives with which the agency had contact were ever asked whether T.L. had any Indian

---

6 Further references to rules are to the California Rules of Court.

ancestry on her mother's side. Agency, however, contends the inquiry was adequate under the facts of the case because father represented to the court that T.L. did not have Native American heritage and did not know of anyone in his family that did. In *In re J.N.* (2006) 138 Cal.App.4th 450 (*J.N.*), the mother appealed contending the juvenile court failed to comply with the duty of inquiry under ICWA. (*J.N.*, at p. 460.) There was no evidence on the record the mother was ever asked about her heritage. (*Id.* at pp. 460-461.) Under these circumstances, our court remanded the matter for the limited purpose of making the proper inquiries to determine whether ICWA applied. (*J.N.*, at pp. 461-462.)

Agency argues *J.N.* is distinguishable because mother has been "unavailable" since December 2017, and remand would be futile. The record reveals that mother contacted the agency in December 2017, but any attempts to serve her with notice of subsequent hearings were not successful. However, the record indicates the agency had also been in contact in November 2017 with T.L.'s maternal aunt, who informed the social worker that T.L.'s maternal grandmother wished to have placement of T.L., which suggests at least two maternal relatives may be available for inquiry if mother is not able to be located.

Agency asks us to follow the line of cases beginning with *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, which agency asserts holds that without some indication that ICWA might actually apply, raising a lack of inquiry on appeal is not appropriate. Agency's reliance on *Rebecca R.* is misplaced. In *Rebecca R.*, there was evidence on the record the court ordered both parents " 'to reveal membership in [an] Indian tribe.' " (*Rebecca R.*, at p. 1429.) The social worker had contact with both parents and represented that ICWA did not apply. (*Rebecca R.*, at pp. 1428-1429.) The father in *Rebecca R.* challenged the proceedings on the ground he was not ordered to complete a parental notification of Indian status form. (*Id.* at p. 1429.) The appellate court rejected the father's claim because the rule requiring the court to order parents to complete such a

form was enacted *after* the proceedings, and there was evidence on the record the court did make an ICWA inquiry of both parents. (*Rebecca R.*, at pp. 1429-1430.) The court in *Rebecca R.* declined to extend our reasoning in *J.N.* because, the court suggested, the father should have made an offer of proof he had Indian ancestry in order to make a showing of miscarriage of justice and therefore obtain relief. (*Rebecca R.*, at p. 1430.) Here, unlike in *Rebecca R.*, there is no evidence on the record the court inquired into whether there was Native American heritage on mother's side. Further, father cannot be expected to make an offer of proof as to mother's ancestry, nor do we agree with *Rebecca R.* that such an action would be appropriate on direct appeal, where the reviewing court is bound by the record before the juvenile court. (See *In re Mary G.* (2007) 151 Cal.App.4th 184, 211-212.)

Accordingly, we hold in agreement with our court's decision in *J.N.* that inquiry error, even without a showing of potential Native American ancestry, is not harmless. As our court said, "We refuse to speculate about what mother's response to any inquiry would be . . . and . . . remand the matter to the trial court with directions, as set forth below." (*J.N.*, *supra*, 138 Cal.App.4th at p. 461, fn. omitted.)

II. The Juvenile Court's Duty to Ascertain T.L.'s Wishes

Father contends the juvenile court had a mandatory and affirmative duty to clarify T.L.'s wishes at the section 366.26 hearing. Father claims this duty arose from T.L.'s comments that she was "not sure" whether she was still in favor of the recommendation of adoption following father's testimony at the section 366.26 hearing, as well as what father characterizes as "muddled" statements regarding her wishes throughout the proceedings. Father contends the order must be reversed and the matter remanded for the court to conduct a new section 366.26 hearing to ascertain T.L.'s wishes. We disagree.

To the extent there was any confusion or ambiguity about T.L.'s wishes with respect to her proposed adoption by Donna and David, father should have raised the issue at the section 366.26 hearing, allowing the juvenile court to consider the issue. T.L.'s

counsel stated T.L.'s feelings on the record. Father's counsel did not argue that T.L. did not consent to adoption or objected to the termination of parental rights. Nor did he attempt to call T.L. as a witness. Because of father's failure to raise the issue below, he has forfeited it. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [dependency matters are not exempt from rule requiring party to raise objection before trial court so error may be corrected]; *In re Erik. P.* (2002) 104 Cal.App.4th 395, 403 [parent must raise any relevant exception at the § 366.26 hearing or waive the right to raise the exception on appeal]; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820 ["[Appellant] raised no issue below that the juvenile court should have obtained the minors' testimony regarding their wishes for a permanent plan. [Citation.] He is precluded from presenting it here."].)

Even assuming father did not forfeit his claim, however, he has not shown reversal is warranted. Father cites our court's decision in *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591 (*Leo M.*), wherein we stated that section 366.26, former subdivision (g)(1), now subdivision (h)(1) "impos[ed] a mandatory duty on the courts to 'consider the child's wishes to the extent ascertainable.' " He relies on this language to support his contention the juvenile court was required to essentially cross-examine T.L. about the statements she had made. Read as a whole, *Leo M.* does not support this contention. To the contrary, in *Leo M.*, we held the juvenile court has sound *discretion* whether to obtain a direct statement from the child or any direct evidence regarding the child's wishes. Rather, if the court determines it is appropriate not to obtain direct evidence of the child's preferences, it may fulfill its statutory obligation by inferring the child's preferences from the record. (*Leo M.*, at pp. 1592-1594.)

Father also argues the child-objection exception may have been "triggered" by T.L.'s statement she was "not sure" she was in favor of the adoption recommendation and therefore the court had a duty to inquire further to determine whether it applied. "Whenever the court finds 'that it is likely the child will be adopted, the court *shall* terminate parental rights and order the child placed for adoption' " unless one of the

statutory exceptions apply. (*In re Celine R.* (2003) 31 Cal.4th 45, 53, italics added.) The child-objection exception arises when "[a] child 12 years of age or older objects to termination of parental rights." (§ 366.26, subd. (c)(1)(B)(ii).) We are not persuaded that the child-objection exception to adoption somehow subverts the court's discretion to obtain a direct statement, particularly when it is the parent's burden to show termination would be detrimental to the minor under the exception. (Rule 5.725(d)(2).)

Nonetheless, the Court of Appeal in *In re Christopher L.* (2006) 143 Cal.App.4th 1326 has held that a child's demonstration of internal conflict of whether he or she wants to be adopted does not satisfy a parent's burden to show the child-objection exception applies. (*Id.* at p. 1335.) In *Christopher L.*, at a contested section 366.26 hearing, the child testified he wanted to be adopted, but when asked, " 'Would you want to be adopted if it meant that—if there was a chance you couldn't ever see your mom again?' " He replied, "No, because I would like to see my mom again." (*Christopher L.*, at p. 1332.) The court terminated the mother's parental rights, and the mother appealed, arguing the evidence was insufficient to support the court's finding the child-objection exception did not apply. (*Id.* at pp. 1332-1333.) The appellate court affirmed the juvenile court's order, finding the record showed the child "did not unequivocally object to the termination of parental rights. . . . Rather, the statements appear to reveal an internal conflict between his hope to be adopted and live in a stable and loving environment, and his hope to see [his mother] again." (*Id.* at pp. 1334-1335.) The *Christopher L.* court declined to consider whether an unequivocal objection prevents the court from terminating parental rights as a matter of law. (*Id.* at p. 1335.)

Here, like in *Christopher L.*, neither T.L.'s statement at the section 366.26 hearing nor any statement she made during the proceedings were unequivocal objections. There was no indication further questioning would have led to an unequivocal objection, but rather the record shows the contrary, that T.L.'s feelings were *equivocal* regarding her adoption. Father contends *Christopher L.* is distinguishable because the child in

Christopher L. testified, and the issue was "fully explored." We note this is not a meaningful distinction because, as previously stated, the court has discretion whether to obtain a direct statement from a child. (See *Leo M.*, *supra*, 19 Cal.App.4th at p. 1592.)[7]

While a court must consider the child's wishes, it must also act in the child's best interest (§ 366.26, subd. (h)(1)); and a "child's wishes are not necessarily determinative of the child's best interest [citation]" (*In re C.B.* (2010) 190 Cal.App.4th 102, 125). It is clear from the record the juvenile court properly considered T.L.'s wishes and acted in her best interests. The court took judicial notice of the entire court file at the section 366.26 hearing, including all of T.L.'s statements throughout the proceedings. Thus, the court had before it all statements father construes as ambiguous. Adoption was the clear recommendation from all parties involved besides father: the agency, T.L.'s CASA, and T.L.'s counsel. This recommendation was based on evidence that T.L. had had a relationship with her caregivers her whole life and referred to them as " 'Mom and Dad,' " requested placement with them, and favored being adopted by them. The recommendation of adoption was also based on T.L. doing very well in her placement, including getting treatment for depression and anger issues and being disciplined. The court's decision was in line with the strong presumption by the law of adoption and stability for T.L. at the section 366.26 hearing.

---

[7] Father cites Family Code section 8602, requiring a child over 12 years of age to consent to his or her own adoption. He, however, appears to concede in his reply brief the statute is not applicable to dependency proceedings and clarifies his argument is primarily based on the child-objection exception and section 366.26, subdivision (h)(1). We note father cites no authority, and we have found none, suggesting the juvenile court must consider whether a child over the age of 12 consents to adoption under Family Code section 8602 in a section 366.26 hearing, where, as here, the child is deemed adoptable.

Father relies on former rule 5.708(e)(4), now rule 5.708(e)(9), requiring minors to sign a copy of a case plan once placed in a permanent placement, in his opening brief, but appears to concede in his reply brief the rule does not apply to proceedings that take place before a permanent plan has been implemented.

For the foregoing reasons, we find the court committed no error by not making further inquiry into T.L.'s wishes.

DISPOSITION

The order of the juvenile court terminating parental rights is conditionally reversed and the matter remanded to the juvenile court for the sole purpose of complying with its duty of inquiry and notice provisions of the Indian Child Welfare Act (ICWA) and for the court to determine whether the ICWA applies in this case as to T.L.'s maternal ancestry. If the court determines the ICWA does not apply, the order shall be reinstated. If information is presented to the juvenile court affirmatively indicating T.L. is an Indian child as defined by the ICWA and the juvenile court determines the ICWA applies to this case, the juvenile court is ordered to conduct a new Welfare and Institutions Code section 366.26 hearing in conformance with all provisions of the ICWA.

In all other respects, the order of the juvenile court is affirmed.

_____
DE SANTOS, J.

WE CONCUR:

_____
PEÑA, Acting P.J.

_____
SMITH, J.